IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner,

vs.

ALAN V. RASH, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR THE PETITIONER

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Opinion Below

The Supreme Court of Texas has issued majority and dissenting opinions in this case, which begin on pages 20 and 26 of the Record. The opinion has been reported at 378 S.W.2d 304.

Jurisdiction

The judgment of the Supreme Court of Texas was entered on April 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Question Presented

In 1954, the following provision was added to Section 2 of Article VI of the Texas Constitution:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

The Supreme Court of Texas held in its decision rendered on April 29, 1964, that, by virtue of this provision, a nonresident at the time of entering the military service of the United States cannot acquire a voting residence in Texas so long as he is in the military service. The question thus presented is:

> Does the provision of the Texas Constitution which prevents persons in the military service from acquiring a voting residence in the county in which they are bona fide legal residents for all other purposes constitute such discrimination against persons in the military service as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

Constitutions Involved

This case involves the last provision of Article VI, Section 2 of the Constitution of the State of Texas. Said provision is set out verbatim in the preceding paragraph. It may be found in Volume 2 of *Vernon's Annotated Texas Constitution,* on pages 339 and 340.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)

Statement

Respondents in this proceeding are Honorable Waggoner Carr, Attorney General of Texas; Honorable Alan V. Rash, Chairman of the Republican Party Executive Committee of El Paso County, Texas; and Honorable Margaret Hockenberry, the "Presiding Judge", who by law has the duties of conducting the Republican Party primary elections in Precinct No. 16 of El Paso County, Texas (R. 2, 18).

Petitioner is a Sergeant in the United States Army. He entered the service in 1946 when he was a resident of Jefferson County, Alabama, and he has been continuously in the military service since that time (R. 3, 18).

Petitioner was born in Bessemer, Alabama, and he is now a resident of El Paso County, Texas. He is thirty-six (36) years of age. He has resided in El Paso County since February of 1962 when he and his family decided to make El Paso their permanent home, and purchased a house at 3408 Sirius Drive. Petitioner presently lives at this address with his wife and two children. He has a son, Bruce Allen, 8 years of age, and a daughter, Debra Lynn, 6 years of age.

Both children attend the public schools in El Paso County, Texas (R. 3, 18).

Petitioner has designated El Paso, Texas, as his permanent home for all purposes on his military records. He intends to reside in El Paso County, Texas, for the remainder of his life. Petitioner is now stationed at White Sands, New Mexico. He has been stationed there since prior to 1962, and at the time he selected El Paso as his home, he had the choice of living in either New Mexico or Texas. He moved to Texas simply because he liked El Paso County and wanted to live here permanently. Because Petitioner has declared El Paso County to be his home for all purposes, he cannot qualify to vote in any county or state other than El Paso County, Texas (R. 3, 18).

Petitioner has purchased a small business which was located in Las Cruces, New Mexico. He has moved the business to El Paso County where he plans to conduct it on a partnership basis (R. 3, 4 and 18).

In Paragraph III of Respondent Carr's Answer to the Petition for Writ of Mandamus, said Respondent stated:

> "Respondent does not deny that Relator is a legal resident of the State of Texas or that this residence carries with it all the rights, privileges and duties of residence except the right or privilege of voting and those rights, privileges and duties which are based on a resident's being a qualified voter" (R. 18).

On December 17, 1963, Petitioner paid the poll tax levied for the year 1963 to the County Tax Collector of El Paso County, Texas. In exchange for such payment, Petitioner received a poll tax receipt which states on its face that it is to be used for voting in the year 1964. Thereafter, on March 18, 1964, Petitioner wrote a letter to Respondent Rash, asking whether or not Petitioner would be allowed

to vote in the Republican Party primary election to be held in 1964. Respondent Rash, in this capacity as Chairman of the Republican Party Executive Committee of El Paso County, and on behalf of Respondent Hockenberry, as "Presiding Judge" of Precinct No. 16, answered by letter that:

> "Mrs. Margaret Hockenberry and I hereby refuse, and will continue to refuse to recognize Sergeant Carrington as a qualified voter. We have taken this position because he is in the United States Army and he resided outside the State of Texas at the time he entered the military service" (see Exhibit "C" of the Petition for Writ of Mandamus) (R. 4, 10-15).

In 1954 the following provision was added to Article VI, Section 2, Constitution of Texas:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces" (R. 21, 27).

Prior to Petitioner's correspondence with the Respondents Rash and Hockenberry, the Respondent Attorney General, in an opinion, had interpreted the above-quoted provision of Section 2 of Article VI of the Texas Constitution in the following manner:

> ". . . This provision relates only to residents of this State; but it does relate both to persons who were residents of Texas before entering service and to persons who became residents of Texas after entering service. If the only place at which a person may vote in this State is the County in which he resided at the time of entering the service, and if at that time he did

> not reside in any County in Texas, it follows that he cannot vote in this State. Accordingly, it was said in an opinion S-148 that *no person who entered service as a resident of another State may acquire a voting residence in Texas while he is in service.*" (Emphasis added.) (R. 5, 13, 20, 21 and 27.)

Based on this opinion, Respondents Rash and Hockenberry refused to recognize Petitioner as a qualified voter (R. 5, 14, 15 and 28).

Upon receiving the letter from Respondents Rash and Hockenberry, which is Exhibit "C" attached to the Petition for Writ of Mandamus (R. 12), Petitioner filed an Original Petition for Writ of Mandamus in the Supreme Court of the State of Texas (R. 2). In said Petition for Writ of Mandamus, Petitioner contended that the above-quoted provision of the Texas Constitution discriminated against persons in the military service, and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment (R. 6). Said contentions were presented in Petitioner's brief and upon oral argument. The Supreme Court of Texas divided on the question of whether or not the Texas Constitution violated the Fourteenth Amendment, and said Petition for Writ of Mandamus was finally denied in a seven to two decision (R. 20-31).

Summary of Argument

Under Article VI, Section 2 of the Texas Constitution, members of the military service who resided outside of the State of Texas when they entered the service but who are now admittedly legal residents of Texas cannot acquire a voting residence in Texas (R. 18, 20). This provision of the Texas Constitution has the effect of preventing Petitioner and other servicemen similarly situated, from ever

becoming a qualified voter in any election so long as they remain in the military service and reside in Texas (R. 3, 18 and 28). The provision segregates all persons in military service as a class, which class is to be treated differently from other persons in regard to the right to vote. Such a distinction is arbitrary and unreasonable because men and women who are members of the Armed Forces should have at least the same voting privileges as members of other professions. Therefore Article VI, Section 2 of the Texas Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

The last sentence of Section 2 of Article VI of the Texas Constitution reads as follows:

> "Any member of the Armed Forces of the United States or component branches thereof, or in the military service of the United States, may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces."

Under the interpretation given said provision, it has the effect of depriving Petitioner of the right to become a qualified voter in any national, state or local election anywhere in the United States so long as he resides in Texas and remains a member of the Armed Forces of the United States (R. 3, 18 and 20). This is so because when Petitioner acquired a legal residence in Texas he lost all voting privileges that he may have had in any other state for the reason that he cannot now meet the residence requirements of any other state. Since the majority of the Texas Supreme

Court has held in this case that the Petitioner cannot acquire a voting residence in Texas, he is left without a place to vote (R. 20, 28).

The Respondent, Waggoner Carr, may contend that the Petitioner, by changing his legal residence to Texas, voluntarily gave up his right to vote in his original state of residence. However, under the facts of this case, since the Petitioner was only 18 years of age when he originally entered the service, in all probability he never had an opportunity to establish a voting residence prior to entering the service. If all states had the same constitutional provision as Texas, Petitioner most certainly could not have acquired a voting residence in any state since entering the service in 1946.

The sole reason for denying Petitioner the right to acquire a voting residence in Texas is that he is in the military service (R. 16, 18, 19 and 20). Respondents admit that the Petitioner would be a qualified voter in Texas if he were not in the military service (R. 16, 18 and 19).

So far as Petitioner can ascertain, Texas is the only state in the United States which denies voting privileges to a legal resident of the State solely for the reason that he is in the military service. Construction workers, doctors, lawyers or tenant farmers who resided in another state when they entered their professions or began their occupations can move to Texas and become qualified voters without retiring or resigning from their professions and occupations. Any law which permits out-of-state civilians to establish residence and become voters but prevents out-of-state servicemen from establishing residence and becoming voters, denies these persons who entered military service from another state and who now reside in this state, the equal protection of the laws. Such a distinction is patently arbitrary and unreasonable.

As stated in the dissenting opinion delivered below, it is elementary that "class legislation" is invalid where the classification is arbitrary and unreasonable (R. 30). The classification must rest on real and substantial differences and must reasonably promote some proper object of public welfare or interest (see *Lassiter* v. *Northampton County Bd. of El.*, 360 U.S. 45 (1959)).

Under the interpretation which has been given to the last provision of Article VI, Section 2 of the Texas Constitution, such provision, by prohibiting members of the military from acquiring a new voting residence while they are in the military service in Texas, defines and creates a special class within this State which, for no reason, is denied the rights and privileges which all other United States citizens possess. Apparently no argument is advanced that the persons of the class are immature, or are of unsound mind or are criminals or public charges. The only thing that can be found to distinguish them from other citizens is that they are members of the Armed Forces.

In the present case, Respondent Carr contends that the purpose of the constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to "complete domination and control of local politics" by military men to the prejudice of the civilian citizens of the community. It is our position that this contention is misleading because there is no proof that there is any such area where the military voting strength would control the local politics, because as a practical matter, many servicemen are not qualified voters in that they have not attained voting age, or are not bona fide residents of the State of Texas, or have failed to pay the poll tax or register for voting in a federal election. However, it is our contention that if a majority of qualified

electors in a particular community happen to be members of the military service, then like any other voting majority, they are entitled to exercise complete dominion and control over local politics.

Not unlike most civilians who move to Texas, Petitioner voluntarily selected Texas to be his permanent home. Petitioner was not forced to move to Texas because of his occupation. In fact, Petitioner is stationed at White Sands, New Mexico, and lives in Texas for no reason other than he likes the City of El Paso, Texas (R. 3, 18). If the matters of concern were that persons in the military service acquire a new residence by the order of their superiors and not by their own choice, and that merely living in Texas is no proof of a desire to make it their permanent residence, then the remedy would be to prescribe what acts are necessary for military personnel to prove the requisite intent to establish permanent residence, rather than to prevent the possibility of establishing residence for voting, no matter what the quantum of proof that their intended home is their newly acquired residence. To foreclose this possibility is to arbitrarily deny military personnel stationed in Texas equal protection of the laws.

Since the Petition for Writ of Certiorari was filed in this Court, a Three-Judge United States District Court, sitting at San Antonio, Texas, has ruled on a very similar case. The Three-Judge Court unanimously agreed with the dissenting opinion delivered below in this cause, and the Three-Judge Court specifically held that Article VI, Section 2 of the Texas Constitution violated the Equal Protection Clause of the Fourteenth Amendment. See *Mabry* v. *Davis,* 232 F.Supp. 930 (W.D. Tex. 1964). The *Mabry* case was tried before Circuit Judge Brown, Chief Judge Spears, and District Judge Thornberry.

In the *Mabry* case, at page 934, the Court quoted extensively from the dissenting opinion delivered in this cause by Associate Justice Clyde E. Smith and concurred in by Chief Justice Robert W. Calvert. The Three-Judge Court specifically approved and adopted the following portion of Justice Smith's opinion:

> "In the present case Respondents contend that the purpose of the Constitutional amendment in question is to prevent a concentration of military voting strength in areas where military bases are located because such concentration might lead to complete domination and control of local politics by military men to the prejudice of the civilian citizens of the community. In my opinion this is not a reasonable ground upon which the State can say that there exists a real and substantial difference between Servicemen and other citizens, and thereby confer different voting rights on these classes.
>
> "With present day mobility and industrialization, large groups, *other than servicemen,* move into the various communities of this state for limited stays, and establish voting residence. One need only look to the large shifts of civilian population to major construction areas as an illustration of this fact.
>
> "Wherein lies the reasonable basis for distinguishing between these groups?
>
> "In the recent case of *Gray* v. *Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), our Supreme Court has said:
>
> "'. . . there is no indication in the Constitution that homesite or *occupation* affords a permissible basis for distinguishing between qualified voters within a State. . . .' (Emphasis added.)

"'. . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, *whatever their occupation,* whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those *who meet the basic qualifications.* . . .'" (Emphasis added.)

The apportionment cases recently decided by this Court emphasize the paramount importance of a citizen's right to vote, and this Court, in very recent decisions, has made it abundantly clear that there may be no discrimination against a class of individuals.

In *Davis* v. *Mann,* 377 U.S. 678 (1964), this Court was concerned with areas in the State of Virginia containing "large numbers of military and military-related personnel." In the *Davis* case Chief Justice Warren, expressing the views of six members of the Court, stated the following at page 617 of 12 L.Ed.2d:

"Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown is constitutionally impermissible."

In *Wesberry* v. *Sanders,* 376 U.S. 1 at page 17 (1964), Justice Black, in the majority opinion, stated the following:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the

> right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

In a separate opinion in *Wesberry*, Justice Clark said,

> "[T]he Equal Protection Clause of the Fourteenth Amendment forbids . . . discrimination. It does not permit the states to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all."

In *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506, at page 523 (1964), Chief Justice Warren, expressing the views of six members of this Court, said,

> "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . . and history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by *wholly prohibiting the free exercise of the franchise.*" (Emphasis added.)

The case at bar presents a much clearer violation of the Equal Protection Clause than the apportionment cases cited

above for the reason that the State of Texas is *wholly prohibiting the free exercise of the franchise* of servicemen who have acquired a legal residence in Texas.

Conclusion

For reasons stated it is respectfully submitted that the Judgment of the Court below should be reversed.

Respectfully submitted,

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